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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER PENA HERRERA, Defendant and Appellant.	G056525 (Super. Ct. No. 17NF1419) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Adrianne S. Denault and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Francisco Javier Pena Herrera of residential burglary. Herrera contends the trial court erred by failing to instruct the jury on criminal trespass as a lesser included offense of burglary. We disagree and affirm the judgment.

I.

FACTS

X.J. returned to his home one evening and found his kitchen window had been smashed. He also found used food wrappers and drink containers on the kitchen and bathroom counters. His bedroom had been ransacked with his and his wife's belongings strewn about the room. Two of his wife's luxury purses and some of her jewelry were gone, and various other items were missing. Police recovered DNA from two of the used drink containers and used that DNA to identify Herrera.

A jury convicted Herrera of first degree residential burglary. (Pen. Code, §§ 459, 460, subd. (a); all further statutory references are to this code.) Herrera appealed.

II.

DISCUSSION

Herrera contends the trial court erred in failing instruct the jury on criminal trespass as a lesser included offense of burglary. Herrera is mistaken.

"California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed." (*People v. Birks* (1998) 19 Cal.4th 108, 112 (*Birks*).) Courts "have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is

necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) An uncharged offense qualifies as a lesser included offense if *either* test is satisfied. (*People v. Parson* (2008) 44 Cal.4th 332, 349.) We review the trial court's decision to not instruct on a lesser included offense de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Herrera wisely concedes criminal trespass, the entry of a residence without the owner's consent (§ 602.5, subd. (a)), is not a lesser included offense of burglary under the elements test. The California Supreme Court has declared as much. (*Birks*, *supra*, 19 Cal.4th at p. 118, fn. 8 ["trespass is not a lesser necessarily included offense of burglary"].) This is "because burglary, the entry of specified places with intent to steal or commit a felony (§ 459), can be perpetrated without committing any form of criminal trespass (see § 602)." (*Ibid*.) That is, "[a] burglary may be committed by one who has permission to enter a dwelling." (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.)

Herrera nevertheless contends criminal trespass is a lesser included offense of burglary under the accusatory pleading test. The information alleged Herrera committed burglary by "unlawfully enter[ing] an inhabited dwelling house . . . with the intent to commit larceny." Because the burglary charge alleged an unlawful entry of a dwelling, Herrera insists the charge included the nonconsensual entry required for trespass, essentially equating an "unlawful" entry with a nonconsensual entry.

We are not persuaded. In burglary, the entry is unlawful because the perpetrator intends to commit a theft or felony. (§ 459.) The perpetrator's state of mind is dispositive, not the owner's consent. (See *People v. Salemme* (1992) 2 Cal.App.4th 775, 780 [someone "'who enters a structure with the intent to commit petty theft or a felony . . . may be convicted of burglary even if he [or she] enters with consent'"].)

Here, the information alleged Herrera unlawfully entered the house with the intent to commit larceny; it did not allege he entered without the victims' consent. Herrera could have committed the burglary as charged without committing criminal

trespass by entering with consent, but also with felonious intent. Thus, criminal trespass is not a lesser included offense of burglary under the accusatory pleading test, and the trial court was not required to instruct the jury on criminal trespass.

Because we conclude the trial court did not err, we need not address whether there was prejudice arising from any instructional error or whether substantial evidence supported an instruction on criminal trespass.

III.

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.